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Introduction

As some of you may be aware, before becoming a partner at Mayer, Brown, I was Executive Director of the U.S. Chamber’s Institute for Legal Reform. During my time there, one of the most important efforts we undertook—an effort that is still underway—is making badly needed reforms in the area of class action litigation.

Our effort first grew out of a concern about the inability of federal courts to exercise diversity jurisdiction over class actions that involve controversies between citizens of different states, but do not satisfy the statutory requirement of “complete diversity.”

It quickly evolved, however, as we began to see how some—and I emphasize *some*—attorneys were taking advantage of the class action mechanism at the expense of the very class members they were supposed to represent.

The result is the Class Action Fairness Act, which has already been passed by the House this Congress, as well as in the last Congress, and which has, so far, failed to achieve “cloture” in the Senate. I’ll speak more to the bill, and in particular its consumer protection provisions, in a moment.

The Broader Civil Litigation Crisis

More broadly, as I’ve thought about the areas where the system is being abused or is otherwise failing, I’ve come to the conclusion that the civil justice system crisis really is rooted in the transformation of the legal profession itself, from the “Learned Profession” to “Trial Lawyer, Inc.” The groundwork for this transformation was laid with the shift in attitude of our profession, and of our society, about litigation.

Under the “Old Order,” a lawsuit was viewed as a conflict between private parties that was to be avoided if at all possible. Litigation was a regrettable event that lawyers were ethically obligated not to encourage.

The legal activism of the 1960s and early 1970s transformed litigation into a public good and amplified the role of lawyers as champions of liberty and justice. By the middle of the 1980s, we had come full circle. The lawsuit, as such, was no longer evil, and litigation was heralded as an attribute of our system in which we ought to take pride.

In an analytical piece of mine which was recently published by the Washington Legal Foundation, entitled *How We Lost Our Way: The Road to Civil Justice Reform*, I note that with this groundwork in place we can look back and see certain milestones that mark

the route we've followed to the crisis we now face: The advent of the business of law; its evolution into "law as just another business"; the changing role of the lawyer in society; the rise of class and mass actions; the rise of activist state attorneys general; and the cultivation of "magic jurisdictions" through judicial electoral politics.

I really believe it's important to keep all of these milestones in mind as we discuss class action trends and where the class action mechanism might be headed in the future, because they really are all interrelated. So, with your indulgence, I'd like to speak briefly about the other five before focusing on the class action milestone specifically.

1. The Business of Law. With the relaxation of ethical rules, especially with regard to the use of the contingency fee, the practice of law became a truly profitable business. While well-intended as a means of facilitating access to legal representation, contingency fees also create an incentive for lawyers to: minimize work so as to maximize their fees-to-hour ratio; settle early in order to finance other contingency suits, or otherwise to prolong litigation in order to test legal theories; and fish for sympathetic jurisdictions. With the increase in clients that resulted from expanded access to legal services and our new acceptance of litigation came the judicial consolidation of tort cases as mass actions and statutorily-sanctioned class actions that clogged the courts and forced settlements, sometimes resulting in huge fees for the attorneys and next to nothing for the individual class members.

2. Law as Just Another Business. With the subsequent relaxation in the 1970s and 1980s of ethical rules relating to the marketing of litigation services, business boomed. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court rejected the notion that "trade" in legal services was unbecoming to the Learned Profession, explaining that law is not a public service provided by our society's philanthropists, but instead a vocation by which hardworking men and women earn their livings. A gradual relaxation of the ban on solicitation soon followed. In 1978, in *In re Primus*, 436 U.S. 412 (1978), the Court held that solicitation involving political or ideological dimensions could not be prohibited. Ten years later, in *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court ruled that attorneys had the right to solicit individuals through targeted direct mail. What was once unseemly became a mere tool of the trade, and the profession became precisely that—just another trade.

3. Lawyers and Society. Under the Old Order, lawyers had occupied a unique position in the American landscape between capital and labor, and self-regulation was a natural result. Today, according to Geoff Hazard, "the bar" is so diverse and fractionalized that it is incapable of governing the profession. The result is a business whose practices are essentially unregulated.

4. Class and Mass Actions. I'll save this for last.

5. Activist State Attorneys General. The rise of activist state attorneys general has profoundly altered our legal system. Lawsuits brought on behalf of states, particularly in the areas of antitrust and public health, have grown rapidly in recent years. Such litigation

raises serious questions about the limits of the constitutional authority of the judicial branch. Through their actions, activist state attorneys general usurp the power of legislatures and administrative agencies, particularly at the Federal level. Just as trial lawyers are attracted to contingency fees, state attorneys general are drawn to the massive sums of money involved in the cases they pursue. These cases can generate considerable state revenue without raising taxes.

6. Magic Jurisdictions” and Judicial Elections. Judicial elections raise many of the same concerns. They threaten the impartiality of judges and lend a false sense of mandate to those activist judges who aspire to be architects of social and economic policy. There is a strong incentive for judges to regulate through litigation, particularly as plaintiffs’ lawyers have a substantial pecuniary interest in judicial elections. Famed plaintiff’s attorney Richard “Dickie” Scruggs has perhaps summed it up best as follows:

[W]hat I call the ‘magic jurisdiction’...[is] where the judiciary is elected with *verdict money*. The trial lawyers have established relationships with the judges that are elected....They’ve got large populations of voters who are in on the deal...And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant in some of these places.¹

Class Actions

The fourth milestone, as I have mentioned, is the proliferation of class and mass actions. While class actions have their origins in medieval England, the first rule providing for group litigation in U.S. federal courts was promulgated as Equity Rule 48 in 1833. Over the next hundred years the rule evolved until the adoption of the Federal Rules of Civil Procedure in 1938.

The real class action explosion was triggered by a revision of Federal Rule of Civil Procedure 23 in 1966. The new Rule 23 profoundly altered the process, leading to significantly larger and more lucrative classes. Rather than requiring individuals to expressly opt into a class, the revised rule allowed all individuals who shared a common attribute (*e.g.*, use of a particular product) to automatically be deemed to have joined a class, unless they affirmatively opted out.

By 1971, four times as many class actions were being filed than had been filed in 1966. Then, in 1974 the Supreme Court found that, in order to certify a class, attorneys were *not* required to demonstrate that the action is likely to prevail on the merits. While the 1970s witnessed a sharp growth in the number of cases based on consumer protection statutes, during the mid-1990s American business experienced a 300 to 1,000 percent increase in the number of class actions they faced.

¹Copland, Jim, *The Tort Tax*, THE WALL ST. J., June 11, 2003.

Class actions were further encouraged through the exploitation of the state court system and diversity jurisdiction rules, which I alluded to earlier. The dramatic rise in state court class and mass actions which has occurred in the past thirty years is also due, in part, to its incompatibility with our current “complete diversity” standard for federal diversity jurisdiction, which requires that no plaintiff be a citizen of the same state as *any* defendant. If you want to keep your nationwide class action against a pharmaceutical manufacturer in that “magic jurisdiction,” all you need to do is add that local drug store as a defendant.

With the shift to state courts comes rampant forum shopping. Plaintiffs’ lawyers game the system in their search for courts with the most sympathetic judges and juries for plaintiffs, the most lax rules of evidence, the most plaintiff-friendly procedural rules, and the least scrutiny of attorneys’ fees. As a result, certain “magnet courts” have become the favored venues for class attorneys, leaving the notion of a “level playing field” a thing of the past.

This race-to-the-bottom mentality provides plaintiffs’ attorneys with a strong incentive to bombard the least-equipped local jurisdictions with the largest class actions, forcing severely backlogged courts to aggregate and defendants to settle. It is the best business model Trial Lawyer, Inc. has hit on to-date.

Madison County, Illinois, which ranks at the top of the list in estimated number of class actions filed each year, is one of the most notorious of these jurisdictions. If class actions across the country were filed at the same *per capita* rate as they are in Madison County, the total number of class actions filed in the United States in 2000 would have been over 42,000. Since 1998, there has been a 5,200 percent increase in the number of class actions filed in Madison County. In 2003, 106 class action lawsuits were filed there, compared with a mere two class actions in 1998.

Just as troubling are the tactics allegedly used by Madison County judges to benefit plaintiffs’ attorneys. To encourage settlements, judges have been known to aggressively expedite scheduling and to schedule multiple cases involving the same defendant and defense counsel for trial on the same day. Judges have imposed equally draconian sanctions on defendants, striking their pleadings and barring all of their evidence.

For those of you who disagree with one, some, or all aspects of the crisis I’ve just described—and I know you’re out there—let me just say this: If you think that the abusive and ruthless tactics of Trial Lawyer, Inc., are reserved for deep-pockets defendant corporations, think again. For these guys, law is simply business, and we all know that business is about just one thing: making a profit. Consider these examples of how consumers and even small business defendants have been hurt by settlements where defendants collude with class counsel to pay big attorney fees, provide minimal recoveries to class members, and give defendants immunity from future suits by that class:

- In a recent class action lawsuit in Illinois against Poland Spring, class members claimed the company's bottled water was not pure and was not from a spring. Under the settlement, consumers received coupons for discounts on Poland Spring water. Poland Spring admitted no wrongdoing and is not changing anything about the way it bottles or markets its water. The only people who made any cash on the settlement were the class action lawyers, who pocketed \$1.35 million.
- In a 2001 Texas class action over late fees on movie rentals, Blockbuster Video agreed to a nationwide settlement in which each plaintiff became eligible to receive up to \$20 worth of coupons for free video rentals (not including new releases) and certificates for \$1 off non-food items. Meanwhile, plaintiffs' attorneys received over \$9.25 million in fees and expenses. It is estimated that less than 10 percent of the coupons were used.
- In an Alabama class action lawsuit against Bank of Boston in the 1990s, the more than 700,000 people in the class "won" the case, but actually lost money. The case involved the amount of money kept in mortgage escrow accounts. Under the settlement agreement, some class members received payments of less than \$10, after which they saw about \$90 deducted from their accounts to pay the \$8.5 million in fees for their lawyers. Class members ended up losing about \$85 to \$90 each.
- In a class action suit against Cheerios over a food additive—with no evidence of injury to any consumers—lawyers were paid nearly \$2 million in fees, which worked out to a rate of approximately \$2,000 an hour. Consumers in the class received coupons for a free box of cereal.
- Local drug store owner Hilda Bankston, who testified before Congress about her class action experiences, was driven out of business after being named in numerous lawsuits alleging defective manufacture of Fen-Phen, Rezulin, and Propulsid. By including her drugstore as a defendant, plaintiffs' lawyers kept cases against out-of-state defendants in Jefferson County, Mississippi, from being removed to federal court. Although she was eventually dropped from the suits, Bankston has been forced to spend thousands of dollars in legal fees.

As I said at the outset, the Class Action Fairness Act began as an effort to update diversity jurisdiction for the modern-day, multi-state class action. But we soon realized that consumers are being victimized by Trial Lawyer, Inc., just as much as, and perhaps more than, defendant companies. So we included some consumer protection provisions in the legislation.

The bill addresses one of the biggest concerns that has been expressed by consumer groups about class actions—the prevalence of coupon settlements that provide little or no value to consumers but result in millions for their lawyers. It says attorneys' fees in coupon settlements must be based on the value of the coupons actually redeemed by consumers or on the hours actually spent bringing the case (rather than the theoretical

value of all the coupons being offered). It also includes a “Consumer Class Action Bill of Rights,” which would:

- require judges to review the fairness of proposed settlements that provide only coupons to class members or impose costs on them;
- protect class members from discrimination based on geographic proximity to the court; and
- require notice to federal and state officials of proposed settlements so they can review them for fairness and possible abuses.

The bottom line is that Trial Lawyer, Inc., now that it has become just another business, needs to be regulated like one. Self-regulation by bar associations and even courts is not working. The time has come for legislatures and executive branch agencies to play a broader role in the regulation of the practice or, should we say, the business of law.